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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
) MUR 5951
)
 Californians for Change f/k/a)
)
 Californians for Obama and its treasurer)
)
 Emmett Cash III)

OBELAA

SENSITIVE

GENERAL COUNSEL'S REPORT #3

I. ACTIONS RECOMMENDED

- (1) Find probable cause to believe that Emmett Cash III violated 2 U.S.C. § 441h(b);
(2) find probable cause to believe that Californians for Change f/k/a Californians for Obama and
its treasurer violated 2 U.S.C. §§ 441h(b), 441d(a), and 432(e)(4); and (3) approve the proposed
conciliation agreement.

II. BACKGROUND

This matter arose from a complaint filed by Ercell Hoffman alleging that Californians for
Change f/k/a Californians for Obama ("CFO" or "the Committee"), an unauthorized committee,
and Emmett Cash III (collectively "Respondents") misrepresented themselves as being affiliated
with Presidential candidate Barack Obama and operated in a fraudulent manner. On
December 2, 2008, the Commission found reason to believe that Emmett Cash III violated
2 U.S.C. § 441h(b) and that the Committee and its treasurer violated 2 U.S.C. §§ 441h(b),
441d(a), and 432(e)(4).

_____ We served the
General Counsel's Brief ("GC Brief") on Mr. Cash and the Committee on March 31, 2011. The
GC Brief sets forth the factual and legal basis upon which we recommend that the Commission

1 find probable cause to believe that Mr. Cash and the Committee violated the Federal Election
2 Campaign Act of 1971, as amended, ("the Act"). Mr. Cash filed an unsigned Reply to the GC
3 Brief ("Reply"), on behalf of himself and the Committee, on April 27, 2011. The Reply mainly
4 blames Durkee and Associates, an accounting firm the Committee hired to do financial reporting
5 and Commission compliance, for the violations of the Act set forth in the GC Brief.¹ As
6 discussed more fully below, Respondents' arguments are not persuasive. Mr. Cash was in charge
7 of the Committee's strategy and acted on its behalf almost entirely by himself.

8 **III. ANALYSIS**

9 **A. Respondents Fraudulently Misrepresented Themselves As Being Affiliated**
10 **With Presidential Candidate Barack Obama's 2008 Campaign**

11
12 The GC Brief describes several instances during which Respondents engaged in
13 fraudulent solicitation. See GC Brief at 5-7 (Telemarketing Solicitations), 7 (Women of Power
14 Cruise), 8-9 (Internet Telethon), and 9 (Merchandise Sales). These instances are also
15 summarized in this report below. In response to the evidence outlined in the GC Brief,
16 Respondents argue: (1) that Durkee and Associates, who Mr. Cash describes as "experts" on
17 fundraising, should have informed them if they had been doing something wrong, as
18 Respondents did not know the law, and (2) all funds generated by their fundraising activities
19 were given to Durkee and Associates. Reply at 2-3. Respondents deny committing fraud, and
20 Mr. Cash denies that he was ever the Committee's treasurer. *Id.* at 2, 3.

21 Under the Act, a person cannot fraudulently misrepresent himself as speaking, writing, or
22 otherwise acting for or on behalf of any candidate or political party or employee or agent thereof
23 for the purpose of soliciting contributions or donations, and a person cannot "willfully or

¹ Kinde Durkee served as treasurer of the Committee at the time of the activity in this matter. See *infra* Section III.A.5.

1 knowingly participate in or conspire to participate in any plan, scheme, or design to" engage in
2 any of the misrepresentations described above. *See* 2 U.S.C. § 441h(b); *see also* 11 C.F.R.
3 § 110.16. To violate section 441h, the Act requires that the violator have the intent to deceive,
4 but does not require that the violator satisfy all elements of common law fraud. *See Explanation*
5 *and Justification* of 11 C.F.R. § 110.16, 67 Fed. Reg. 76,962, 76,969 (Dec. 13, 2002); *see also*
6 *Neder v. United States*, 527 U.S. 1, 24-25 (1999) (citing *United States v. Stewart*, 872 F.2d 957,
7 960 (10th Cir. 1989) (interpreting federal mail, wire, and bank fraud statutes)). Further, courts
8 have held that even absent an express misrepresentation, a scheme devised with the intent to
9 defraud is still fraud if it was reasonably calculated to deceive persons of ordinary prudence and
10 comprehension. *See United States v. Thomas*, 377 F.3d 232, 241-43 (2d Cir. 2004) (interpreting
11 federal statute prohibiting the inducement to travel in furtherance of a scheme to defraud), *citing*
12 *Silverman v. United States*, 213 F.2d 405 (5th Cir. 1954) (interpreting federal mail fraud statute).

13 **1. Telemarketing solicitations**

14 The CFO telemarketing script strongly implies that calls seeking contributions were
15 being made on behalf of the Obama campaign. The script says that the caller is calling on behalf
16 of "Californians for Obama," and explains that "We are Senator Barack Obama's California
17 Organization to help put the face-of-change in the White House. We are calling tonight to
18 receive your financial support for Senator Obama's 2008 presidency's bid." *See* script at Durken
19 Response at D0496-497. The script goes on to solicit contributions of several dollar amounts
20 and identifies to the potential contributor several of Senator Obama's policy positions on issues
21 such as health care, foreign oil dependence, and the Iraq war. *Id.* Each time the caller solicited
22 funds, he or she was to ask "Can Senator Obama count on your support with a [dollar amount]

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1 donation today?" *Id.* In the Reply, Mr. Cash asserts that "[w]ritten statements presented to
2 Durkee and Associates . . . were approved by Durkee and Associates." Reply at 1.

3 Mr. Cash's statement is not convincing because the handwritten words on the script state
4 "Approved Emmett Cash State Chairperson Californians for Obama," and he testified that the
5 signature on the document was his. Deposition of Emmett Cash III, dated November 23, 2009
6 ("Dep.") at 54. Mr. Cash initially explained that he wrote "approved" on the script because it
7 was "the verbiage to be used" in the telemarketing calls. *Id.* However, he later claimed that he
8 only approved it to be sent on to Kinde Durkee for her review and approval of the substance of
9 the script because he had doubts about the language, despite his assertion earlier in his deposition
10 that Ms. Durkee was only involved in the financial aspects of the Committee. *Id.* at 22, 55-66.
11 Moreover, in her interview, Ms. Durkee denied reviewing the telemarketing script. Finally, even
12 if Durkee and Associates approved the statements, it does not vitiate Mr. Cash's liability as he
13 was in charge of the Committee's strategy and acted on its behalf almost entirely by himself.
14 *See, e.g.,* Letter of Agreement for telemarketing services signed by Mr. Cash, as "State
15 Chairman and Coordinator" of Californians for Obama. *See* Letter of Agreement at Durkee
16 Response at D0499-0501.

17 **2. Women of Power Cruise**

18 The Committee scheduled a "Women of Power Cruise" for September 21-24, 2007. A
19 promotional brochure described the event as a "3-Day Cruise with Powerful & Power-filled
20 Women." *See* "Women of Power Cruise" brochure at Durkee Response at D0618. The brochure
21 contained the name "Emmett Cash III, State Chairman & Coordinator, Californians for Obama"
22 and included the Committee's FEC identification number and the Committee's website address.
23 *Id.* In the Reply, Mr. Cash asserts that "[s]tatements made by the press [to the effect that

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1 Mr. Cash, not Obama for America, was benefiting financially from the cruise] were not true and
2 stated without checking for facts." Reply at 1. Mr. Cash also claims that "[a]ll funds were
3 turned over to Durkee and Associates." *Id.*

4 The issue, however, is not what Mr. Cash did with the funds received for the cruise;
5 rather, the issue is whether Mr. Cash misrepresented himself in CFO's solicitations for
6 contributions as acting on behalf of then-Senator Obama by actions such as including in the
7 cruise brochure the name "Emmett Cash III, State Chairman & Coordinator, Californians for
8 Obama." We interviewed two people who registered for the cruise and a vendor who printed
9 materials for the cruise, and they each thought that the cruise would benefit the Obama
10 campaign. See GC Brief at 7.

11 **3. Internet Telethon**

12 The Committee's website included a link to an "Internet Telethon." A flyer advertised
13 that the "Obama Internet Telethon" featured the heading "Californians for Obama," a picture of
14 the candidate, and a statement from Emmett Cash III that included, "I am serving as State
15 Chairman of 'Californians for Obama' to give Senator Obama the opportunity to become the next
16 President of the United States... With your help we, the people, can support Senator Obama for
17 President of the United States...." See "Internet Telethon" brochure at Durkee Response at
18 D0648. A press release from Californians for Obama advertised that "a host of entertainers will
19 convene to lend their support for Senator Barack Obama, and his run for the Presidency of the
20 United States." *Id.* at D0169. The telethon featured several speakers, including Mr. Cash, who

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1 repeatedly asked viewers to go to CFO's website and contribute up to \$2,300 to support then-
2 Senator Obama's presidential campaign. _____

3 In the Reply, Mr. Cash stated that the "Internet Telethon did not take place as
4 contracted." Reply at 2. However, the Committee did place the telethon on its website, available
5 at <http://web.archive.org/web/20070401093323/http://www.californiansforobama.com>.

6 Mr. Cash also asserts that Durkee and Associates should have informed them if "as to what
7 [they] needed to do as it related to actions [they] needed to take regarding fundraising"

8 Reply at 2. Again, even if Durkee and Associates advised Mr. Cash in this manner, it does not
9 eliminate Mr. Cash's liability because he was in charge of the Committee's strategy and acted on
10 its behalf almost entirely by himself. See "Internet Telethon" brochure at Durkee Response at
11 D0648.

12 **4. Merchandise Sales**

13 The Committee's website included a link to a "Campaign Memorabilia" page that sold
14 "Obama '08" and CFO merchandise, including bumper stickers, t-shirts, and caps. Mr. Cash
15 stated that the Committee sold both Californians for Obama merchandise and general Obama '08
16 merchandise even after Obama's authorized committee directed him to stop using the name
17 "Californians for Obama." Cash Dep. at 80-81; Letter at Durkee Response at D0657-0658.
18 Some of the contributors we interviewed who purchased CFO merchandise believed that the
19 proceeds of the sales would benefit the Obama campaign, and some believed that the proceeds
20 would benefit CFO or pay the cost of the merchandise. See GC Brief at 18.

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1 In the Reply, Mr. Cash acknowledged that they sold merchandise and stated that "the
2 names of persons purchasing merchandise were given to Durkee and Associates along with the
3 funds." Reply at 2. Again, Mr. Cash misses the point. The violation of 2 U.S.C. § 441h(b) is
4 based on Mr. Cash's misrepresentation that he was acting on behalf of the Obama campaign for
5 the purpose of soliciting contributions or donations, not what Mr. Cash did with the money
6 derived from the merchandise sales. See 2 U.S.C. § 441h(b); see also 11 C.F.R. § 110.16.

7 **5. Committee Treasurer**

8 Kinde Durkee filed the Committee's disclosure reports with the Commission as treasurer
9 of the Committee until January 29, 2009. On January 30, 2009, an amended Statement of
10 Organization was electronically filed by the Committee. The amended Statement of
11 Organization indicated that it was signed and filed by Mr. Cash. The Committee's 2009 Mid-
12 Year and Year-End disclosure reports also indicate that they were signed and electronically filed
13 by Mr. Cash. In his Reply, however, Mr. Cash asserts he was never the Committee's treasurer.
14 Reply at 3. In light of Mr. Cash's statement, we checked the electronic filing acknowledgements
15 and discovered that the amended Statement of Organization and the 2009 Mid-Year and Year-
16 End disclosure reports were in fact electronically filed by Durkee and Associates, the accounting
17 firm of which Kinde Durkee is president. Thus, it is not clear which individual actually serves as
18 treasurer. However, this ambiguity does not change our legal analysis or the merits of our
19 recommendation that the Commission find probable cause to believe that Mr. Cash, in his
20 individual capacity, violated 2 U.S.C. § 441h(b), and that the Committee and its treasurer
21 violated several provisions of the Act. See MUR 5453 (Giordano for United States Senate)
22 (Commission found reason to believe the committee "and its treasurer" violated the Act where
23 the former deputy treasurer claimed he was never the committee's treasurer and that his signature

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1 was signed without his consent to documents stating that he was the treasurer); MUR 4904
2 (Halter Marine Group, Inc. PAC) (Commission found reason to believe the committee "and its
3 treasurer" violated the Act because the former treasurer informed the Commission that he had
4 retired and it was unclear who would serve as the committee's new treasurer).

5 **6. Conclusion**

6 The evidence, which Mr. Cash does not refute, shows that he acted with intent to deceive
7 contributors. Mr. Cash signed "approved" on a draft telemarketing script that contained many
8 phrases that suggested CFO's affiliation with the Obama campaign. Mr. Cash's verbal
9 representations and the Committee's printed and electronic communications made it reasonable
10 for individuals to believe that CFO was fundraising for the Obama campaign. The Committee's
11 name "Californians for Obama," and Mr. Cash's title, "State Chair" or "State Chairman," created
12 the impression that the organization was the official representative of the national Obama
13 campaign in the State of California. The Committee's website and printed materials prominently
14 featured images of the candidate and appeals to "support Senator Obama for President of the
15 United States." See GC Brief at 16. The Committee sold "Campaign Merchandise" that
16 included both "Californians for Obama" and "Obama '08" merchandise. Individuals who
17 interacted with Mr. Cash in conjunction with CFO operations, including telemarketing vendor
18 Irene Waitzman, then-treasurer Kinde Durkee, and printing vendor Fidel Rodriguez,³ all claimed
19 that Mr. Cash represented that he was in communication with the Obama campaign and that the
20 campaign was supporting his actions. All of these representations were reasonably calculated to

³ Mr. Cash claims that he prevailed in a lawsuit brought by Mr. Rodriguez's printing company, apparently for an unpaid bill. See Reply at 3 ("The Judge's ruling stated that I owed them nothing."). However, the Case Summary from that lawsuit indicates that judgment was entered in favor of Mr. Rodriguez's printing company in the amount of \$6,005.47. See Case Summary for *Rodriguez, Fidel vs. Californians for Obama*, Los Angeles Superior Court case number 08C05093.

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1 deceive persons of ordinary prudence and comprehension, satisfying the fraudulent solicitation
2 standard in section 441h(b). *See United States v. Thomas*, 377 F.3d at 241-43.

3 Accordingly, because the evidence establishes that Mr. Cash and the Committee created
4 the false impression that they were fundraising on behalf of the Obama campaign, we
5 recommend that the Commission find probable cause to believe that Emmett Cash III and
6 Californians for Change f/k/a Californians for Obama and its treasurer violated 2 U.S.C.
7 § 441h(b).

8 **B. The Committee Violated 2 U.S.C. § 432(e)(4) By Using Then-Senator**
9 **Obama's Last Name in the Committee's Name**

10
11 Mr. Cash does not dispute the facts or our conclusion that the Committee violated
12 2 U.S.C. § 432(e)(4), *see* GC Brief at 20, which prohibits the use of a candidate's name in the
13 name of an unauthorized committee. 2 U.S.C. § 432(e)(4); *see also* 11 C.F.R. § 102.14(a).
14 Instead, Mr. Cash contends that Durkee and Associates did not tell him to change the name of
15 the Committee. Reply at 3. The investigation confirmed that CFO registered with the
16 Commission in December 2006 and conducted activities and fundraising using the last name of
17 candidate Barack Obama. It was not until August 9, 2007, more than four months after Mr. Cash
18 sent his March 23, 2007, letter to the Obama campaign asking for approval to continue
19 operations, that the Committee filed an amended Statement of Organization and changed its
20 name from Californians for Obama to Californians for Change.⁴ Even if CFO initially intended
21 to serve as a draft committee, it failed to include that intention in its name, and President Obama
22 formally declared his candidacy on February 10, 2007, before much of CFO's activity. *See*
23 11 C.F.R. § 102.14(b)(2). Although former treasurer Kinde Durkee indicated that a RAD

⁴ On July 17, 2007, the general counsel for Obama for America sent a letter to Mr. Cash requesting that he cease operations as "Californians for Obama." *See* Letter at Durkee Response at D0657-0658.

Analyst told her that the Committee could use the name "Californians for Obama," *see* GC Brief at 12-13, according to RAD, no such authorization occurred.

Accordingly, based on the undisputed evidence that CFO registered with the Commission in December 2006 and conducted activities and fundraising using the last name of candidate Barack Obama, we recommend that the Commission find probable cause to believe that Californians for Change f/k/a Californians for Obama and its treasurer violated 2 U.S.C. § 432(e)(4).

C. Respondents Failed to Include Proper Disclaimers on Public Communications and Website

The Committee's website contained no disclaimer except for one on the "Contribute" page, and that disclaimer failed to state whether the website was authorized by a candidate and who paid for the website. It is also likely that the Act's disclaimer requirements applied to the telemarketing conducted by Precision of Iowa because the telemarketing vendor made almost 17,000 calls on behalf of CFO between February 6, 2007, and March 3, 2007. *See* Precision of Iowa invoices at Durkee Response at D0980, D0954, D0997, D1014, D1037, D1076, D1077, D1106, D1107, D1139, and D1140, Waitzman email to Office of General Counsel dated June 8, 2009. Mr. Cash did not address the disclaimer violations in the Reply; instead, he stated that "[a]ll printed matter was given to [Durkee and Associates] for approval" and that "Durkee and Associates should have given us the proper disclaimer." Reply at 3.

The Act requires political committee public communications to contain disclaimers. 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11(a)(1). The disclaimer requirements apply to all internet websites of political committees. *See* 11 C.F.R. § 110.11(a)(1). The disclaimer requirements also apply to public communications, including communications by mass mailing or telephone bank. *See id.*; 11 C.F.R. § 100.26. A mass mailing and a telephone bank means more than 500

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1 pieces of mail and more than 500 calls, respectively, of an identical or substantially similar
2 nature within a 30-day period. 11 C.F.R. §§ 100.27 and 100.28. The communication, if not
3 authorized by a candidate, must clearly state the name and permanent street address, telephone
4 number, or World Wide Web address of the person who paid for the communication and state
5 that the communication is not authorized by any candidate or candidate's committee. 2 U.S.C.
6 § 441d(a)(3); 11 C.F.R. § 110.11(b)(3).

7 Based on the undisputed evidence that the Committee's website and the telemarketing
8 calls did not contain proper disclaimers, we recommend that the Commission find probable cause
9 to believe that Californians for Change f/k/a Californians for Obama and its treasurer violated
10 2 U.S.C. § 441d(a).

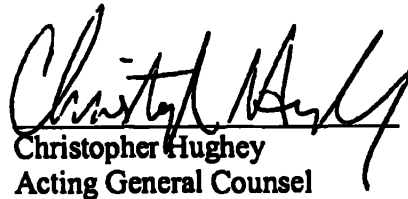
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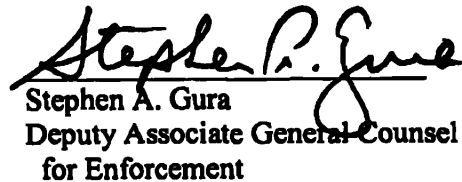
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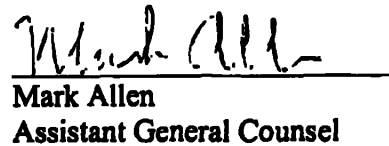
V. **RECOMMENDATIONS**

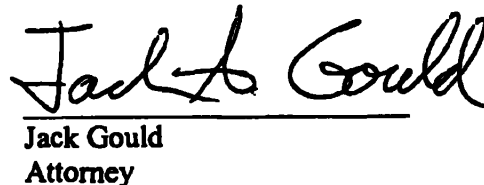
1. Find probable cause to believe that Emmett Cash III violated 2 U.S.C. § 441h(b);
2. Find probable cause to believe that Californians for Change f/k/a Californians for Obama and its treasurer violated 2 U.S.C. §§ 441h(b), 441d(a), and 432(e)(4);
3. Approve the attached proposed conciliation agreement; and
4. Approve the appropriate letter.

July 8, 2011
Date


Christopher Hughey
Acting General Counsel


Stephen A. Gura
Deputy Associate General Counsel
for Enforcement


Mark Allen
Assistant General Counsel


Jack Gould
Attorney

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